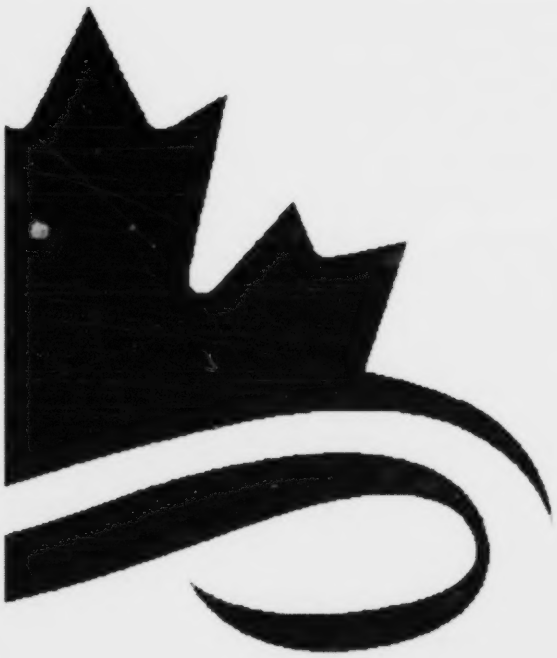
Canadian Human Rights Commission
Commission canadienne des droits de la personne



Human Rights and the Return to Work: The State of the Issue

By
Marie-Claude Chartier
April 28, 2006

The opinions expressed in this report are those of the author and do not necessarily reflect the views of the Canadian Human Rights Commission. This document may be reproduced free of charge as long as acknowledgement is made of the source.

Aussi offert en français sous le titre Le retour au travail et les droits de la personne : l'état de la question

Table of Contents

Introduction 1
Part I. The characteristics of long-term absenteeism in Canada 3
Part II. Health changes in employees 4
2.1 The medical certificate and the collection of medical data 4
2.2 Medical examinations 6
2.3 Screening tests 7
Part III. Protection against discrimination based on disability, pregnancy or marital status 8
3.1 The right to equality under the *Canadian Human Rights Act* 8
3.2 The duty to accommodate 10
3.3 Undue hardship with respect to health and safety 11
3.4 Undue hardship with respect to cost 11
3.5 Other factors in the assessment of undue hardship 12
3.6 The duty to accommodate in cases of excessive absenteeism 13
3.7 The obligations of the employee in seeking accommodation 14
3.8 The obligations of the union in seeking accommodation 14
Part IV. Examples of accommodation imposed by the courts 16
4.1 Drug or alcohol dependence 16
4.2 Psychological illnesses 17
4.3 Pregnancy 19
4.4 Family status 21
Part V. The management of absenteeism: a continuing strategy 22
5.1 A workplace disability management program 22
5.2 Cooperation and dialogue 23
5.3 Working conditions that promote the physical and mental health of employees 25
5.5 Training and education 27
5.6 Planning the return to work 29
Conclusion 31
Bibliography 32

Abbreviations

ABA Journal	American Bar Association Journal
B.C.C.A.A.A.	British Columbia Collective Agreement Arbitration Award
B.C.C.H.R.	British Columbia Council of Human Rights
B.C.H.R.T.	British Columbia Human Rights Tribunal
C.A.	Court of Appeal
C.H.R.D.	Canadian Human Rights Tribunal Decisions
C.H.R.R.	Canadian Human Rights Reporter
C.H.R.T.	Canadian Human Rights Tribunal
D.T.E.	Droit du travail express
F.C.	Federal Court
F.C.A.	Federal Court of Appeal
J Occup Environ Med	Journal of Occupational and Environmental Medicine
J Occup Health Psychol.	Journal of Occupational Health Psychology
L.A.C.	Labour Arbitration Cases
O.J.	Ontario Judgments
Q.L.	Quick Law
Queen's L. J.	Queen's Law Journal
R.J.D.T	Recueil de jurisprudence en droit du travail
R.J.Q.	Recueil de jurisprudence du Québec
R.S.Q.	Revised Statutes of Quebec
S.C.R.	Supreme Court Reports
S.A.	Statutes of Alberta
S.A.G.	Sentences arbitrales; griefs
S.C.	Statutes of Canada
S.C.	Superior Court
S.C.O.	Superior Court of Ontario
Sask Bd. of Inquiry	Saskatchewan Board of Inquiry
T.A.	Tribunal d'arbitrage
T.D.P.Q.	Tribunal des droits de la personne du Québec

Introduction

In many complaints to the Canadian Human Rights Commission, a dispute arose between employer and employee when the employee returned to work after a prolonged absence, such as sick leave, a workplace accident or maternity leave. Management of a return under such circumstances poses many challenges for the parties involved. A fragile balance must in fact be maintained between the management rights of the employer and the employee's rights to equality, privacy, dignity and physical integrity.

After a lengthy absence, employees often need workplace arrangements to be made so that they can return to work. Canada's human rights legislation, which protects individuals against discrimination based on disability, pregnancy or marital status, requires an employer to do everything reasonably possible to facilitate the continued employment of an employee who has had to be absent from work for such reasons. Employees and, where applicable, their unions also have a part to play in seeking accommodation and an obligation to cooperate in the process in good faith. Reconciling the interests of the parties is not always easy. Over the last 20 years, case law concerning the duty to accommodate has developed at a very rapid pace and has had an undeniable impact on the management of long-term absences. With the increasing cost of absenteeism and resulting complex obligations , employers and employee representatives are increasingly well advised to adopt strategies for the management of disabilities that will help resolve the problem at its source and reconcile the interests at stake.

The purpose of this paper is to describe how matters stand in relation to employees returning to work after a prolonged absence. The issues raised in our research may be used to develop guidelines for employers to facilitate efficient management of absences that respects the fundamental rights of employees. The first part of the paper surveys the characteristics of long-term absenteeism in Canada. The second addresses the means available to employers for monitoring the state of an absent employee's health, while respecting his or her fundamental rights. The third deals with protection from discrimination provided by the *Canadian Human Rights Act* and the resulting duty to accommodate. The fourth gives examples of accommodation measures required by the courts in cases of drug or alcohol dependence, psychological illness,

pregnancy or family obligations. Lastly, the fifth presents a series of measures to facilitate the efficient management of long-term absenteeism.

Part I. The characteristics of long-term absenteeism in Canada

Long-term absenteeism is a significant and expensive problem in Canadian society. At any given time, an estimated 8 to 12% of the workforce is absent through injury or illness and is receiving an allowance of some kind.[1] The costs generated by disability and income support programs, and the cost of lost productivity, are steadily increasing.[2] The increases are such that the parties involved are increasingly considering the possibility of reducing coverage to keep insurance premiums at levels that are reasonable both for employers and employees.[3] Moreover, long-term absenteeism means the loss of experienced employees' skills and contribution , and may incur financial and emotional costs for employees and their families.

Stress related to technological change, administrative reorganizations, an aging workforce and the growing difficulty reconciling work and family responsibilities[4] are contributing to the increase in extended absences.[5] There are undeniable connections between stressful working conditions, the growing difficulty reconciling work and family, and physical and mental health problems.[6]

The last decade has been marked by a substantial increase in absences due to stress and mental health problems. The World Health Organization further predicts that depression will be the leading cause of disability in the world by 2020.[7] Mental illness is a veritable scourge that will

---

[1] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management, 2nd Edition, 2004.*

[2] Conseil du Patronat du Québec, *L'absentéisme en milieu de travail : la situation* [Employers' Council of Quebec: Workplace Absenteeism: the Situation], File 98-14, 1998, p. 14.

[3] Groupe Conseil AON, "Santé mentale au travail : Quand la tête et le cœur n'y sont plus... [Mental Health in the Workplace: When the Head and the Heart Are No Longer in It]," (Oct. 2001) 69 *Assurances*, p.487-496, p.487.

[4] In a report published by Canadian Policy Research Networks, 50% of mothers and 36% of fathers reported difficulty reconciling family and job-related responsibilities: J. Jenson, *Catching Up to Reality: Building the Case for a New Social Model*, Jan. 2004, www.cprn.org (March 18, 2006); Ontario Human Rights Commission, *Human Rights and the Family in Ontario*, March 2005.

[5] It is instructive to note that time spent at work increased considerably during the 1990s in all job sectors. In 1991 it was estimated that one worker in ten worked more than 50 hours per week, but the proportion had quadrupled by 2001. In this connection, see Linda Duxbury, Chris Higgins, Richard Ivey, *The 2001 National Work-Life Conflict Study: Report One*, Public Health Agency of Canada, p.10. The study was based on a sample of Canadian workers drawn from the public, private and non-profit sectors. Those surveyed worked for organizations with 500 employees or more.

[6] On the connections between Canadians' growing difficulty balancing work and family and the increased risk of developing physical or mental illness, see Linda Duxbury, Chris Higgins, Richard Ivey, *Work-Life Conflict in Canada in the New Millennium: A Status Report.* Public Health Agency of Canada, p.7.

[7] World Health Organization, *Mental Health Disorders Management*, Geneva www.who.int/mental_health/management/depression/definition/en/ (February 28, 2006).

affect about one in five Canadians during their lives.[8] Canadian insurance companies see a link between mental illness and 40% of short-term disability cases, as well as 35% of long-term cases.[9] It is estimated that each year Canadian businesses now pay out $18 billion in costs resulting from psychological illnesses and drug and alcohol dependence. These are the fastest-rising health costs in the private sector.[10]

Part II. Monitoring of health changes in employees

In this part, we shall review the means available to employers for monitoring the health of employees who are absent because of illness or injury. Management of such absences poses special difficulties, since it is not easy to predict the date or circumstances of an employee's return. In such cases, we shall see that employers can get information to enable them to manage absences and returns to work as effectively as possible, particularly through doctor's certificates, medical examinations and screening tests. We shall also see how the courts have restricted the use of such monitoring mechanisms so as to minimize infringements of employees' fundamental rights to dignity, privacy and physical integrity.

2.1 The medical certificate and the collection of medical data

An employer needs certain information concerning a sick employee in order to manage such aspects as pay and benefits. When planning for a return to work, an employer must also be able to ensure that the work will be done safely and efficiently. An employer may require an employee to supply a doctor's certificate providing the relevant information.[11]

The content of the medical certificate, however, must be limited to the information that is indispensable to the employer in order to minimize any infringement of the employee's privacy

---

[8] Standing Senate Committee on Social Affairs, Science and Technology, *A Proposal to Establish a Canadian Mental Health Commission*, October 2005, www.parl.gc.ca (March 3, 2006), p. 1.
[9] Groupe Conseil AON, "Santé mentale au travail : Quand la tête et le cœur n'y sont plus...," op. cit., p. 490.
[10] Standing Senate Committee on Social Affairs, Science and Technology, *A Proposal to Establish a Canadian Mental Health Commission*, op. cit., p. 1
[11] *Syndicat des employés et employées professionnels et de bureau, section locale 57* and *Caisse populaire St-Stanislas de Montréal*, [1999] R.J.D.T. 350 (T.A.).

rights.[12]. The Privacy Commissioner of Canada has indicated that it is appropriate for an employer to request a medical certificate confirming an employee's disability and indicating the expected date of his or her return to work. An employer may also verify whether an employee returning to work after sick leave is fit to resume his or her duties, or whether workplace accommodation is required.[13] An employer may refuse to allow an employee to return to work if the doctor's certificate is not clear on this point.[14] However, this does not necessarily mean that an employer is entitled to know the specific diagnosis of an employee's illness.[15] The obligation to include a diagnosis on the certificate is limited to cases where it is clearly and legitimately necessary.[16] For example, in case 257, the Commissioner found that the corporation's policy of demanding a medical diagnosis in the case of sick leave requiring a medical certificate was contrary to the *Personal Information Protection and Electronic Documents Act.* She deliberated as follows:

It was entirely appropriate and reasonable for the organization to require medical certificates when the employees' absences exceeded the allowable limit for uncertified sick leave. However, the word of the employees' physicians should have been sufficient. The corporation was entitled to request and receive certification that the complainants were ill, but, as the organization itself has acknowledged, it is not necessary to require employees to provide diagnostic information in cases of suspicious absences. Although such a purpose is legitimate and diagnostic information may in some circumstances be necessary to its fulfilment, it was both unnecessary and inappropriate for the organization to have demanded medical diagnoses in the circumstances of these cases.

An employee is free to authorize an employer to access medical information. However, an authorization that is too broadly worded, leading to the disclosure of information on physical and

---

[12] The right to privacy, enshrined in Canadian human rights legislation, includes protection from unauthorized collection and dissemination of personal data. Personal data held by businesses and regulated sectors of the federal government are protected by the *Personal Information Protection and Electronic Documents Act.*

[13] See cases 119, 135 and 257, Privacy Commissioner of Canada.

[14] *Shell Canada Products Ltd* and *C.A.I.M.A.W.*, Local 12 (1990), 14 L.A.C. (4th) 75 (Larson).

[15] See cases 257, 233 and 135, Privacy Commissioner of Canada.

[16] Some rulings from adjudication tribunals stipulate that an employer is entitled to know the diagnosis in cases of prolonged or repeated absence. For example, see *Biscuits David Ltée* c. *Syndicat des employés des biscuits David-C.S.N.*, S.A.G. 83-07-155; *Aliments Culinar Canada Inc.* c. *Syndicat national de la biscuiterie de Montréal*, S.A.G. 94-05-133, *Services ménagers Roy Ltée* c. *Union des employés et employées de service, Section locale 800*, S.A. 96-03054. Cited in C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme* [Practical Management of Absenteeism], Cowansville, QC, Yvon Blais, 2000, p. 31.

mental health that is none of the employer's concern, may be found to be inconsistent with the Act.[17]

An employer's right to access medical information about an employee does not extend to all representatives of the employer,[18] who is required to put in place a system for collecting and holding information that preserves confidentiality, in accordance with the *Privacy Act*.[19] Employers can avoid many difficulties related to the disclosure of medical information by adopting a clear policy that all employees are familiar with.[20] By developing precise standards for the use of information, the employer instills a culture of trust that encourages employees requiring accommodation in order to return to work to provide such information more readily.[21]

2.2 Medical examinations

Conducting a medical examination violates a person's right to physical integrity and privacy. The Supreme Court has ruled that paramount importance must be given to physical integrity. Limitations of that right are thus allowed only under very specific circumstances.[22]

In accordance with its right to manage and its obligation to protect employees' health and safety, an employer may require an employee to undergo a medical examination by a specialist of its

---

[17] See, for example, *Scobus Inc.-Mauricie* et *Syndicat des employés de Scobus Mauricie*, [1993] T.A. 186, 191, cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail* [Human Rights and Labour Relations], Cowansville, Yvon Blais, Updated Nov. 17, 2005, paragraph 23.321.

[18] For example, in case summary # of the Privacy Commissioner of Canada, "The complainant, who worked for a transportation company, objected to injured Co-workers, temporarily employed in the company's office, handling confidential payroll information." The Commissioner found that "This practice posed a serious risk that the workers could have accessed sensitive personal information to which they should not have been privy." She recommended "making the handling of payroll information part of the permanent duties of a few authorized office personnel." She further recommended that those involved sign a confidentiality agreement and receive training in order to understand fully what such an agreement entails.

[19] The Office of the Privacy Commissioner of Canada has prepared a handbook for companies to help them meet their obligations under the *Personal Information Protection and Electronic Documents Act*: *A Guide for Businesses and Organizations - Your Privacy Responsibilities*, updated March 2004. Available at the Web site: http://www.privcom.gc.ca/information/guide_e.asp (February 25, 2006).

[20] See cases 118 and 119, Privacy Commissioner of Canada.

[21] See Canadian Human Rights Commission, *Preventing Discrimination: the Duty to Accommodate*, paragraph 24, http://www.chrc-ccdp.ca/preventing_discrimination/page7-en.asp?lang_update=1#24f (March 23, 2006).

[22] See in particular *The Queen v. Pohoretsky*, [1987] 1 S.C.R. 945; *R.* v *Morgentaler*, [1988] 1 S.C.R. 30. cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 17.003.

choosing when the employee returns to work. However, the employer should exercise such a right only if it has reason to believe that an employee is not fit for work, and that a return to work might endanger his or her health or that of others.[23] An examination will generally be allowed when an employee is returning to work after a serious illness or accident. However, mere apprehension of a relapse or the possible aggravation of a medical condition is not sufficient to refuse to accept the return of an employee who presents a certificate stating that he or she is fit for work. An employer must demonstrate a real, immediate and significant risk to the employee's health.[24]

There are cases where a medical examination is explicitly provided for in legislation or in a collective agreement. Even if an examination is provided for in a collective agreement or an attendance program, such provisions do not take precedence over fundamental rights and must not be abused.

2.3 Alcohol and drug testing

When an employee return to work after treatment for alcohol or drug use, an employer is generally entitled to test whether an employee is abstaining from drugs or alcohol and ensure that the employee is able to work without endangering himself or herself or co-workers.[25] Some adjudicators who have overturned dismissals for drug or alcohol use have required reinstated employees to submit to testing by the employer for periods of up to two years.[26] Since alcohol and drug testing violates the dignity, physical integrity and privacy of the individual, employers

---

[23] *Monarch Fine Foods Co. Ltd* and *Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees*, Local 647 (1978), 20 L.A.C. (2[d]) 419 (M.G. Picher); C. Le Corré; F. Demers; G. Dulude, *La Gestion pratique de l'absentéisme*, op cit., p. 46, L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 16.280.

[24] See various decisions of adjudication tribunals to this effect in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraphs 16.230, 16.232 and 16.282.

[25] *Canada (Human Rights Commission) v. Toronto-Dominion Bank*, [1988] 4 C.F. 205 (C.A.).

[26] *Re Canadian National Railway Company* and *United Transportation Union*, (1990) 6 L.A.C. (4th) 381, *Re City of Winnipeg* and *Canadian Union of Public Employees*, Local 500, (1992) 23 L.A.C. (4th) 441; *Union des employés et employées de service, section locale 800 (FTQ)* et *Commission scolaire English-Montreal*, [2005] R.T.J.D.T. 960 (TA) and other decisions cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraphs 17.070, 17.122 to 17.124.

are restricted to the testing necessary to ensure sobriety, without unduly infringing the employee's privacy.[27]

Part III. Protection against discrimination based on disability, pregnancy or marital status

In this part, we shall examine the protection offered by the *Canadian Human Rights Act* against discrimination in employment and the resulting duty to accommodate. We are particularly interested in the impact of that duty on the terms of a return to work by persons who have been absent for reasons of disability, pregnancy or marital status. To that end, we shall analyse the roles and responsibilities of the employer, the employee and the union in seeking adjustments that will help keep people working.

3.1 The right to equality under the *Canadian Human Rights Act*

The *Canadian Human Rights Act* is designed to extend Canadian legislation by giving effect, within the scope of Parliament's authority, to the principle of the right of all persons to equal opportunity for personal growth and the satisfaction of their needs.[28] In particular, the Act prohibits discrimination in employment based on disability, pregnancy or marital status.[29]

It is discriminatory to refuse to employ or continue to employ any individual or to "differentiate adversely in relation to an employee on a prohibited ground of discrimination."[30] Unions are also

---

[27] C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme*, op cit., p. 61. In order to minimize infringement of employees' rights, the testing procedure should include a number of guarantees, apart from those respecting the competence of the laboratory and the personnel. The Commission des droits de la personne et des droits de la jeunesse du Québec summarizes these guarantees as follows: "First, although the consent of the applicant or employee cannot be considered to have been freely given, it must nevertheless be informed. The employer must therefore inform the employee in what circumstances testing may take place and explain the consequences of the test. The person tested must also be given access to the results, under legislation governing access to personal data. Lastly, test data—such as the medication used by the employee, cannot be disclosed to the employer by the laboratory, in order to preserve its confidentiality." Commission des droits de la personne et des droits de la jeunesse, La compatibilité avec la Charte québécoise des tests de dépistage de drogue en emploi [Human Rights and Youth Rights Commission: Compatibility Between the Quebec Charter and Workplace Drug Tests], Quebec City, June 1998.

[28] Section 2.

[29] Section 3(1) further prohibits discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, and conviction for which a pardon has been granted. Section 3(2) states that where discrimination is based on pregnancy or childbirth, it is deemed to be based on sex.

[30] Section 7.

subject to the Act, which prohibits them in particular from acting with regard to a member[31] in a way that denies him or her an employment or promotion opportunity, or impairs such an opportunity.[32] The Act also forbids employers and unions to agree on practices or enter into agreements that discriminate with respect to promotion, training, apprenticeship or transfer.[33]

Disability is the main ground of discrimination cited in complaints to the Canadian Human Rights Commission.[34] It is also the main reason for long-term absence from work. It is thus important to note that the term is defined very broadly. The *Canadian Human Rights Act* defines it to include "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."[35] The Supreme Court has also favoured a wide and liberal interpretation of "disability."[36] Protection against discrimination based on a disability covers both actions based on perceptions, myths and stereotypes, and actual functional limitations.[37] In particular, the courts have ruled that musculoskeletal diseases, renal failure, psychological or psychiatric illness, vision problems, respiratory problems, migraine, eczema and insomnia may constitute a disability.[38]

In the management of the disability of an employee absent on maternity leave or for reasons of disability or marital status, an employer must therefore take care not to act in a manner that could prove discriminatory. To that end, it may have to revise a measure already in place, or make arrangements in the workplace to facilitate an employee's reintegration.

---

[31] Section 9(c). In this context, "member" means a person who belongs to a union, or anyone in respect of whom a union has obligations under a collective agreement.
[32] Section 9(c).
[33] Section 10.
[34] Canadian Human Rights Commission, *Annual Report (2004)*, Ottawa. In 2004, 39% of complaints to the Commission were based on disability.
[35] Section 25.
[36] The principles developed in the various laws on human rights are essentially the same. The courts give broad meaning to the interpretations made of similar provisions in other laws. The Supreme Court has ruled that the interpretation of such laws should be consistent even where the wording is not identical, unless there is a specific provision indicating the clear desire of a provincial legislature to assign a different orientation, protection or goal to a particular provision. In this connection, see *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353; *Québec (Commission des droits de la personne et des droits de la jeunesse)* c. *Montréal (Ville)*; *Québec (Commission des droits de la personne et des droits de la jeunesse)* c. *Boisbriand (Ville)*, [2000] 1 S.C.R., cited in: L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., p. 6-5.
[37] Québec (Commission des droits de la personne et des droits de la jeunesse) c. Montréal (Ville de); Québec (Commission des droits de la personne et des droits de la jeunesse) c. Boisbriand (Ville), [2000] 1 S.C.R., par. 39-41.
[38] See judgments cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraphs 8.348.

3.2 The duty to accommodate

After a long absence, it is often necessary to take accommodation measures in an employee's workplace in anticipation of their return. Accommodation may involve changes in the work environment, duties or hours of work. Under the *Canadian Human Rights Act,* the employer has a duty to thoroughly evaluate the possibility of taking measures to meet the needs of those to whom the Act refers.[39] The duty to accommodate is recognized in all Canadian human rights legislation and is considered an integral part of every collective agreement in this country.[40]

However, the duty to accommodate is not unlimited. An employee's right to equality must be balanced against the employer's right to run a productive workplace. Under section 15 (1)(*a*) of the *Canadian Human Rights Act*, a "refusal, exclusion, expulsion, suspension, limitation, specification or preference" is not a discriminatory practice if the employer establishes that it is "based on a *bona fide* occupational requirement."[41] When an employee returns to work, the employer is not obliged to adopt measures to accommodate him or her if it will impose undue hardship on the employer "considering health, safety and cost."[42] The three-step test has been

---

[39] Sections 2 and 15.

[40] Since the Supreme Court's decisions in *Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, [2003] 2 S.C.R., and N.A.P.E. c. Terre-Neuve (Green Bay Health Care Centre) 2 S.C.R. 3, it is clear that labour adjudicators have the right and the duty to apply rights that flow from human rights legislation. Labour tribunals now constitute one of the main fora for discussion of the duty to accommodate; Chris Rootham, Sean McGee, Bill Colf, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases," *(2004) 11 Canadian Labour & Employment Law Journal, p.69-112,* p. 79; Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," (1998) 49 *Labour Law Journal*, p. 962-980, p. 965.

[41] The Supreme Court of Canada, in *Meiorin, British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R., developed a new three-step test to determine whether a measure or standard adopted by an employer constitutes a *bona fide* occupational requirement. To satisfy its criteria, the employer must show:
1. that it adopted the standard for a purpose rationally connected to the performance of the job;
2. that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose, and that it is impossible to accommodate individual employees sharing the characteristics of (the employee concerned) without imposing undue hardship upon the employer. On this subject, see in particular: Canadian Human Rights Commission, *Bona Fide Occupational Requirements and Bona Fide Justifications under the Canadian Human Rights Act*, 2000.

[42] Section 15(2), *Canadian Human Rights Act*.

spelled out in section 15(2) of the Act since 1998.[43] The Supreme Court has listed other factors that may be considered in determining whether accommodation imposes undue hardship. As we shall see, all of these factors vary from case to case, as does their significance.

3.3 Undue hardship with respect to health and safety

A risk to health or safety is often cited by employers in refusing to reinstate a person with a disability in their position or in another suitable position. It is in fact their duty to control, if not eliminate, the risk of relapse and to protect the health and safety of everyone in the workplace.

When an employer cites a risk to the health of an employee, it must be able to demonstrate that the employee's return to work poses a real and immediate risk of relapse or aggravation. Evidence of a potential or hypothetical risk is not sufficient.[44]

The burden of proof upon the employer is much less when the safety of the public is at issue.[45] However, in order to refuse to reinstate, the employer must show that the employee in question poses a sufficient risk of human error.[46] Evidence of a slight or negligible risk will not suffice. In measuring the risk, the employer must take into account the objective dangerousness of the job. There must also be a close relation between continuing to employ someone and the probability that the risk will materialize.[47]

3.4 Undue hardship with respect to cost

---

[43] *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9.

[44] *Union des employés du transport local et industries diverses, section locale 931 (I.B.T.)* et *Aramak inc.*, D.T.E. 2002T-6003. See also part 2.2 of this paper on medical examinations in such cases.

[45] L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 8.408.

[46] *Ontario Human Rights Commission* v. *Etobicoke*, [1982] 1 S.C.R. 202; *Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561*; *Action Travail des femmes v. Canadian National Railway Company [1987] 1 S.C.R. 1114*; *Saskatoon (City of)* v. *Saskatchewan Human Rights Commission*, [1989] 2 S.C.R. 1297; *Large* v. *Stratford (City of)*, [1995] 3 S.C.R. 733; cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.290.

[47] Ibid.

In some cases, the undue financial hardship that would ensue may excuse the employer from the duty to accommodate. This is particularly true of small businesses, for which the cost of accommodation may have a greater impact. As the Canadian Human Rights Commission has stated, "Large corporations, for example, would find it hard to prove undue hardship on the basis of cost alone, as would federal departments and agencies. Such organizations usually have the budgetary and organizational scale and flexibility to accommodate special needs at relatively little cost."[48]

Factors to be considered in determining the cost impact of accommodation include: the size and financial resources of the employer, the availability of other jobs or of external sources of funding, and the details of any other risk or disadvantage.

3.5 Other factors in the assessment of undue hardship

The Supreme Court has listed other factors that may be considered by an employer in determining whether accommodation imposes undue hardship.[49] They include: the nature of the work, the number of employees, their interchangeability and the impact of accommodation on the collective agreement.[50] The courts have found that the need to replace someone with special skills, a significantly increased workload for other employees, the need for a major reorganization, the impossibility of a subsequent return to a normal work schedule, and a very high risk of relapse are among that factors that may constituter undue hardship.[51] However, there is a school of case law that considers these factors to be less significant, since they are not explicitly referred to in section 15(2) of the *Canadian Human Rights Act.* [52]

---

[48]Canadian Human Rights Commission, *Preventing Discrimination: The Duty to Accommodate*, paragraph 10, http://www.chrc-ccdp.ca/preventing_discrimination/page3-en.asp?lang_update=1 (March 14, 2006).
[49] See *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489, 520-521.
[50] For more information on the repercussions of a collective agreement on accommodation, see part 3.8 of this paper.
[51] See a series of decisions to that effect in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.542.
[52] The Canadian Human Rights Commission stated in the obiter dicta in *Desormeaux* v. *Ottawa-Carleton Regional Transit Commission*, [2003] C.H.R.D. No.1 (QL) par. 91, and in *Parisien* v. *Ottawa-Carleton Regional Transit Commission*, [2003] C.H.R.D. No. 6 (QL), par. 60, that the only reason it considered the set of criteria developed in *Central Dairy Pool* and *Renaud* in the Transit Commission cases was that the complaints were filed before passage of section 15(2) of the *Canadian Human Rights Act*. For a detailed analysis, see Chris Rootham, Sean McGee, Bill Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases," op, cit, p. 77.

3.6 The duty to accommodate in cases of excessive absenteeism

An employee may be unable to return to work for a prolonged period or may have to be absent very frequently. While such absences may be justified because of a disability or the employee's marital situation, an employer is not obliged to indefinitely employ someone who is not capable of normal, regular job performance.[53] When absenteeism becomes excessive, the employer resorts to dismissal on administrative grounds. However, for such drastic action to be justified, it will have to show that the employee's rate of absenteeism has been much higher than that of the other employees over a long period.[54] It will also have to prove that the employee's absenteeism is unlike to improve to enable him or her to meet normal standards of performance and attendance within the foreseeable future.[55] Finally, the employer will have to show that the absenteeism imposes undue hardship on its business and that it is not possible to accommodate the employee. This may be achieved by establishing the impossibility of coping with the inconvenience of frequent, sustained and unpredictable absences, such as the effect on staff movements, quality of output and the workload of the other employees.[56]

Some clauses in employment contracts, collective agreements or absenteeism management policies provide for automatic termination after a prolonged absence. It seems, however, that such provisions do not relieve the employer of its duty to examine the possibilities for accommodation case by case, while respecting the employee's human rights.[57]

It may happen that an employee is absent frequently because of various illnesses or accidents. In such cases, it will be difficult to predict the chances for improvement in the record of absenteeism. Frequent absenteeism resulting from minor illness may become dubious and lead to dismissal. The employer may then adopt more of a disciplinary approach (notices, documented

---

[53] C. Le Corré; F. Demers; G. Dulude, *La Gestion pratique de l'absentéisme*, op cit., p. 23.
[54] Case law seems to find that a minimum of two years must elapse before dismissal in such cases.
[55] C. Le Corré; F. Demers; G. Dulude, *La Gestion pratique de l'absentéisme*, op cit., p. 23.
[56] Ibid.
[57] This seems to be a controversial but nevertheless dominant interpretation. See in particular *Toronto Star Ltd.* v. *CEP and Bachouse*, (1997) 97, C.L.L.C. 230-014; *Toronto Hospital* (1992), 31 L.A.C. (45h) 22 (P.C. Picher); (Uniroyal Goodrich Canada Inc. (1996), 60 L.A.C. (4th) 260 (Solomatenko); Canada Packers (1992), 28 L.A.C. (4th) 193 (Solomatenko); cited in Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," op cit., p. 970.

meetings).[58] It will have to notify the employee that their job is at risk and give them a chance to improve.[59] Where there are a number of unrelated illnesses, it will be up to the employee to show the ability to deliver normal job performance.

3.7 The obligations of the employee in seeking accommodation

The employee must cooperate fully in the effort to find reasonable accommodation. Except where circumstances make this impossible, as in the case of certain psychological conditions or a dependence on alcohol, the employee must clearly inform the employer of any needs or limitations that apply upon a return to work[60] and facilitate the application of any accommodation measures proposed by the employer and the union. An employee cannot expect a perfect solution and must accept any arrangement that is reasonable in the circumstances.[61] For example, if no permanent position is available that meets the employee's needs, he or she must be prepared to accept training or offers of temporary work, or else lose the possibility of accommodation.[62] However, accommodation should not impose an excessive burden on the employee.[63] Finally, the employee is always obliged to provide a reasonable explanation of any refusal of an accommodation measure.[64]

3.8 The obligations of the union in seeking accommodation

---

[58] C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme*, op cit., p. 24.
[59] Ibid.
[60] *Belleville General Hospital* and *S.E.I.U., Local 183* (1993), 37 L.A.C. (4th) 375 (Thorne), cited in Morton Mitchnick, Brian Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, Lancaster House, Volume 2, December 2005, pp. 14-60.
[61] *United Food & Commercial Workers, Local 1518* v. *Save-on-Foods # 969*, [2005] BCCAAA No.53 (QL), *Quackenbush* v. *Purves Ritchie Equipment Ltd*, [2004] BCHRTD No. 10 (QL), *Anderson* v. *Alberta*, [2004] A.J. No. 1216 (QL); Morton Mitchnick, Brian Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, op. cit., pp. 14-66; Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," op cit., p. 979.
[62] *CANPAR* and *U.S.W.A., Local 1976* (2000), 93 L.A.C. (4th) 208 (M. Picher), *Re Canadian Pacific Ltd.* (1996), 57 L.A.C. (4th) 129 (M. Picher); Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," op cit., p. 980.
[63] For example, the Supreme Court found that giving an employee a day without pay out of a 5-day work week to meet the requirements of the employee's religion constituted an excessive burden on the employee; L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.531.
[64] *Guibord* v. *Queen*, (1996), 97 C.L.L. C. 230-019, cited in Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," op cit., p. 980.

When an employee is unionized, the union is obliged to cooperate with the employer in finding a reasonable solution that will respect the employee's rights while taking into account the constraints that the situation imposes on the employer.[65] The union may incur liability jointly with the employer for any prejudice caused to a person who is discriminated against when it has made an insufficient effort to accommodate.[66]

The unions are often in a delicate position when a solution proposed by an employer conflicts with the rights of other employees provided for in the collective agreement. Some accommodation measures may create resistance among Co-workers, in such matters as a realignment of working hours.[67] In many cases, in fact, collective agreements give priority in the choice of hours to employees with more seniority. In such cases, the union may demand that the employer try first to take measures that do not affect rights under the collective agreement, but cannot use the collective agreement as a pretext for objecting to the employer's suggestions.[68] In refusing to comply with a request for accommodation, a union will have to show that an employee's Co-workers are suffering significant harm or a major infringement of their rights.[69] For example, case law is fairly consistent to the effect that a person with a disability may be placed in a vacant position even if they have less seniority than other employees who may want the position.[70] It seems, however, that a disability does not allow one employee to take a position occupied by another with less seniority, unless the collective agreement expressly provides for this.[71]

---

[65] *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970, 991 et seqq; *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3; L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.520.

[66] *Central Okanagan School District no. 23* v. *Renaud*, [1992] 2 S.C.R. 970 cited: L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.520.

[67] C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail* [Disciplinary and Non-Disciplinary Action in Group Labour Relations], Cowansville (QC), Éditions Yvon Blais, 2001, 482 p., p. 272.

[68] See *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R.

[69] *Central Okanagan School District No. 23* c. *Renaud*, [1992] 2 R.C.S. 970, pp. 991-992 (Sopinka J). Case law is not consistent on this point, and the courts have reached different decisions based on similar facts: see several relevant decisions in Chris Rootham, Sean McGee, Bill Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases," op. cit.

[70] *Re Union Carbide Canada* (1991), 21 L.A.C. (4th) 261 (Hinnegan), cited in Michael Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," op cit., p. 973.

[71] Ibid, p. 972, 977; *Re Better Beef ltd.* (1994), 42 L.A.C. (4th) 244 (Welling).

Additional problems may arise when positions that could meet the needs of an employee requiring accommodation are outside their bargaining unit. In a number of cases, adjudicators have ruled that positions outside the bargaining unit must be included in the list of possibilities in seeking an accommodation if no position is available within it.[72]

Christian Brunelle provides a very good explanation of the challenge unions face in reconciling the interests of all the employees they represent:

"[TRANSLATION] Torn between two legal cultures—labour law, and the equally distinctive human rights law—unions have no choice but to forge connections between them and revise their concepts of democracy accordingly to incorporate the interests both of the majority and of the minority. Should they fail to do so, there is a danger that they will be marginalized in favour of more individualistic pressure groups. However, if they succeed in taking up this daunting challenge, they will find in the diversity of their members the support and creativity they need in order to continue defending their interests far into the future."[73]

Part IV. Examples of accommodation imposed by the courts

The need to adopt measures to facilitate an employee's earliest possible return to his or her job, or another suitable one, must be assessed individually. The nature of the measures needed will vary from case to case. However, some situations merit special attention, having characteristics the employer and the union will have to consider in seeking whatever measures are appropriate. In this part, we shall review a few examples of accommodation imposed by the courts in relation to drug or alcohol dependence, psychological disability, pregnancy or marital situation.

4.1 Drug or alcohol dependence

---

[72] *Re Riverdale Hospital* (1994), 41 L.A.C. (4th) 24 (Knopl); *Municipality of Metropolitan Toronto* (1994) 46 L.A.C. (4th) 110 (Fisher). Also see *Municipality of Metropolitan Toronto* v. *C.P.U.P. E., Local 79*, (1994) 35 L.A.C. (4th) 357, 363 (arb. B. Fisher); *West Park Hospital Toronto* v. *Ontario Nurses Association*, (1996) 55 L.A.C. (4th) 78, 114-116 (Adj. J. E. Emrich); *Queen's Regional Authority* v. *I.U.O.E.*, Loc. 942 (Snow), (1999) 78 L.A.C. (4th) 269, 277 et seqq. (Chrisite), cited in C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail*, op. cit., p. 382.

[73] C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail*, op cit., p. 382.

Since drug or alcohol dependence is regarded as a disability within the meaning of the *Canadian Human Rights Act*, employers must seek to accommodate employees in order to help them keep their job. An employer must be attentive to its employees' behaviour, since it has a duty to provide support even if an employee will not admit openly that the problem exists.[74] This is justified by the fact that denial is often one of the symptoms of the disease.[75] An employer with reason to believe that an employee has dependence problems is therefore obliged to let the employee know they have a problem and offer them an opportunity to correct it, before taking disciplinary action.[76] An employer may dismiss an employee who is frequently absent because of this kind of problem only if the employee has had sufficient time to take responsibility for it, but shows little likelihood of improvement.[77] Since the relapse rate after treatment is high, an employer will sometimes have to allow the employee a second or third course of treatment. Reinstatement after treatment may then be conditional on perfect attendance and mandatory drug or alcohol tests.[78] However, every situation must be considered individually. In this connection, note that a drug and alcohol testing policy calling for automatic termination after a second offence was found to be inconsistent with the duty to accommodate by the Canadian Human Rights Tribunal.[79]

The employee has an obligation to cooperate in the improvement of his or her situation.[80] An employer may naturally take disciplinary action against an employee who refuses the assistance offered or shows insubordination by, for example, driving while impaired.

4.2 Psychological illnesses

---

[74] Ibid, *p.64.*
[75] Morton Mitchnick, Brian Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, op. cit., Volume 2, December 2005, pp. 14-63.
[76] C. Le Corré; F. Demers; G. Dulude, *La Gestion pratique de l'absentéisme*, op cit., pp. 63-64.
[77] See, for example, *Société canadienne des postes* c. *Sylvestre*, D.T.E. 93T-57 (C.A.).
[78] L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 17.122.
[79] *Milazzo* and *Autocar Connaisseur inc.* [2005] C.H.R.D., No.3 (QL); on the legality of last-chance agreements, see Morton Mitchnick, Brian Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, op. cit., Volume 2, December 2005, section 14.5.
[80] See, for example, *Syndicat des employées et employés professionnels (les) et de bureau, section locale 434* et *Banque Laurentienne du Canada*, D.T.E. 98T-523 (T.A.), in which an employee suffering from alcoholism failed to show that she had met her obligations in that she refused to attend the required treatments paid for by her employer; cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 6.532.

A number of psychological conditions, such as depression or chronic anxiety, are considered a disability under Canadian human rights legislation.[81] These are often the most difficult cases to manage, because the absences are lengthy, the date of return to work is difficult to predict, and those affected hesitate to talk about their problem or are unable to do so.[82] An employee normally has a duty to indicate clearly to his or her employer what accommodation measures would facilitate a return to work. However, the situation is different when the employee has a mental disability, since the disability may make it impossible for him or her to assess the situation clearly.

When an employer observes abnormal behaviour in an employee, such as an emotionally fragile state, it has an obligation to at least investigate whether accommodation is needed in order for the employee to perform properly.[83] If so, the employer must approach the employee discreetly and in a non-confrontational manner to discuss the potential need for accommodation.[84] As appropriate, a union representative or other trusted person should be present.

The employer must therefore take the employee's psychological state into consideration in making decisions affecting that employee.[85] For example, in *Mager v. Louisiana-Pacific Canada Ltd*,[86] the employer encouraged an employee with a history of severe depression to accept a lay-off after she requested leave to try to resolve her personal problems. The court found that the

---

[81] For summaries of a number of judgments concerning the duty to accommodate in relation to various psychological illnesses, see Michael A. Coady, Sheila M. Tucker, *Accommodating Mental Disabilities*, presented at the Duty to Accommodate in the Unionized Workplace Conference, Borden Ladner Gervais, March 6, 2002.

[82] C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme*, op cit., p. 71.

[83] The employer has a duty to accommodate employees who appear to require it, even if they do not request it, on the basis of the "ordinary person test." If an ordinary person had the same information about an employee as the employer has, would he or she realize that the employee required accommodation? In this connection, see Canadian Human Rights Commission, *Preventing Discrimination: The Duty to Accommodate*, paragraph 23, http://www.chrc-ccdp.ca/preventing_discrimination/page7-en.asp?lang_update=1#23f (March 29, 2006), citing *Conte* v. *Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 (C.H.R.T). See also *Zaryski* v. *Loftsgard* (1995), 22 CHRR D/256 (Sask Bd. of Inquiry); *Willems-Wilson* v. *Allbright Cleaners Ltd.*, [1997] BCHRTD No 26 (QL) cited in Michael A. COADY, Sheila M. TUCKER, *Accommodating Mental Disabilities*, op. cit.

[84] See Canadian Human Rights Commission, *Preventing Discrimination: The Duty to Accommodate*, paragraph 23, http://www.chrc-ccdp.ca/preventing_discrimination/page7-en.asp?lang_update=1#23f (March 29, 2006). In this document, the Commission lists the key points to be communicated to the employee at such meetings.

[85] See part 5.3 of this study on the early detection of mental illness and action an employer can take in such cases.

[86] [1998] BCHRTD No. 36 (QL) cited in Michael A. Coady, Sheila M. Tucker, *Accommodating Mental Disabilities*, op. cit., p. 15.

employer should have ensured that she understood all the consequences of being laid off. It should also have explained to her that she could also take sick leave and draw income-maintenance benefits under the program in place.

There are various myths and a stigma about mental illness. An employer must base decisions concerning an employee with mental illness on medical findings as to the employee's fitness to work. If it fails to do so, it runs the risk that its decisions will be based on prejudice and stereotypes and will therefore be discriminatory.[87]

There are cases in which the impact of an employee's illness constitutes undue hardship for the employer, which will then have no choice but to terminate the employee. For example, an employer did not have to reinstate an employee as a boat handler after he damaged a boat following an anxiety attack, and the risk of relapse remained difficult to predict.[88]

Accommodation required by a situation sometimes entails obligations both for the employee and for the employer. For example, reinstatement of an employee may be conditional on their taking medication, on regular medical checks, and on the obligation to disclose their condition to their colleagues, so that they will know what to do in an emergency.[89]

4.3 Pregnancy

The Supreme Court has recognized that the financial and social cost of having children must not be borne solely by women, and that it is imperative to consider pregnant women's needs in the workplace.[90] Women who are absent from work because of pregnancy must be able, insofar as

---

[87] For example, in *Gordy* v. *Oak Bay Marine Management Ltd.*, [2004] BCHRTD No. 180 (QL), it was found that the employer had failed to become fully informed about the risks associated with its employee's bipolar condition and to consider alternative positions to accommodate it; Morton Mitchnick, Brian Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, op. cit., Volume 2, August 2003, pp. 14-104. Also see section 5.5 of this paper regarding the importance of training and educating employees and management about the myths surrounding some forms of disability.

[88] *Cameron* v. *Fletcher Challenge Canada Ltd.*, (1995), 24 CHRRD/506 (BCCHR), cited in Michael A. Coady, Sheila M. Tucker, *Accommodating Mental Disabilities*, op. cit., p 17.

[89] See, for example: *International Brotherhood of Electrical Workers, Local 258* v. *Code Electric Products Ltd.*, [2005] BCCAAA. No. 14 (QL) and *Shuswap Lake General Hospital* v. *BCNU* (the "Lockie" grievance), [2002] BCCAAA No. 21 (QL).

[90] *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

possible, to return to their jobs and benefit from accommodation measures to prevent being limited in their employment or promotion opportunities when they go back to work.

The Tribunal des droits de la personne du Québec has described as follows the form such accommodation may take:

"[TRANSLATION] Temporary transfer to a safer job, part-time work, flexible hours, the right to refuse overtime, the possibility of taking time off and leave without pay are some of the arrangements employers might consider in the accommodation of women who are pregnant."[91]

Accommodation may also involve extending maternity leave or making work arrangements to enable an employee to nurse her child.[92] It may also include training upon her return to work to update her knowledge, so that her chances of promotion will be equivalent to those of her Co-workers.[93]

Pregnant women can be especially vulnerable when they are term employees. Some employers may be tempted not to renew their contract because of pregnancy.[94] However, the policy of school boards in not granting contracts to employees who were not available from the beginning of their commitment because they were pregnant or on maternity leave has repeatedly been ruled illegal.[95] In their decisions, the courts found that there was discrimination, and that the employer had failed in its duty to accommodate its employee by offering her the position, since doing so did not impose undue hardship in such cases.

---

[91] *Commission des droits de la personne du Québec* c. *Lingerie Roxana Ltée*, [1995] R.J.Q. 1289 (T.D.P.Q.), p. 1295, cited in L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 7.265.

[92] Ontario Human Rights Commission, *Policy on Pregnancy and Breastfeeding*, 2001, www.ohrc.on.ca (March 15, 2006), which cites among other decisions *Carewest* v. *Health Sciences Association of Alberta* (January 8, 2001) [2001] A.G.A.A. No. 2 (J.C. Moreau).

[93] Similar training was required by the Canadian Human Rights Tribunal to meet the needs of a female employee suffering from dyslexia in auditory processing: *Canada (Attorney General)* v. *Green*, D.T.E. 2000T-701 9 F.C.A.), confirmed in part by D.T.E. 98T-880 (C.H.R.T.).

[94] L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail*, op. cit., paragraph 7.265.

[95] Ibid, paragraphs 7.265 to 7.270: *Canada (Attorney General)* v. *Mongrain*, [1992] 1 F.C. 472 (F.C.A.) *Commission des écoles catholiques de Québec* c. *Gobeil*, D.T.E. 99T-682 (C.A.); *Commission scolaire du Lac St-Jean* c. *Caron*, D.T.E. 94T-456 (C.S.), appeal abandoned, C.A. Québec, n° 200-09-000178-944; *Commission scolaire de Jean Rivard* c. *Québec (Commission des droits de la personne)*. D.T.E. 99T-1012 (C.A.).

4.4 Family status

Discrimination based on family status has not led to many complaints to tribunals in Canada. Note that there is no decision in Canada concerning the obligation to care for an aged relative. This is surprising, given the aging of the population and the growing number of Canadian families living in households made up of three generations.[96]

Case law seems to recognize the employer's duty to accommodate parents obliged to care for their children when there is manifest incompatibility between family and occupational responsibilities. Such accommodation may include flexible or reduced hours, changes in work schedules, or leave.[97] However, the nature of appropriate accommodation and the respective responsibilities of the two parties have yet to be clearly defined.[98] The Ontario Human Rights Commission has a list of questions that Canadian courts have yet to address, which could have a huge impact on employers and employees:[99]

"For example, is an employer required to provide paid or unpaid time off for a parent who needs to tend to the medical needs of a child or parent? Should employees who are required to take time off work to care for a sick parent or child be subject to attendance monitoring programs? Is an employer required to schedule shifts that are compatible with child care arrangements? May an employee refuse to travel where child care arrangements cannot be made, or travel would conflict with parental obligations? Is an employer required to permit full-time employees with children to adopt part-time or modified work schedules or take leaves of absence, and if so, under what circumstances?"

An obvious gap exists in this area. In this connection, note that the Ontario Human Rights Commission plans to address some of these issues soon in a statement of principles on discrimination based on family status.[100]

---

[96] The numbers of such households grew by 39% between 1986 and 1996, a trend strongly associated with the profile of contemporary immigration. Almost half of such households are headed by recent immigrants: Ontario Human Rights Commission, *Human Rights and the Family in Ontario*, op. cit., p. 5.

[97] Ibid, pp. 28 to 32, citing *Brown* v. *M.N.R. Customs and Excise* (1993) 19 C.H.R.R. D/39; *Wight* v. *Ontario* (No. 2) (1998), 33 C.H.R.R. D/191; leave to appeal denied (June 26, 2000) [2000] O.J. No. 2924 (Ont. Sup. Ct.); *Health Sciences Association of British Columbia* v. *Campbell River and North Island Transition Society* 2004 BCCA 260, May 10, 2004.

[98] Ibid, p.32.

[99] Ibid, p.32.

[100] Ibid, p.5. The Commission's statements of principles establish standards that determine how individuals, employers, service suppliers and policymakers should act in ensuring that they respect the Ontario Human Rights Code (R.S.O. 1990, Chapter H.19.).

Part V. The management of absenteeism: a continuing strategy

Absenteeism is a phenomenon that every employer has to deal with sooner or later. The experts all agree that it must be managed proactively in order to reduce the financial and human costs. As we shall see, it is important for an employer to act at various levels, including prevention and the management of disability while the employee is absent, and upon their return to work.[101] While each absence must be individually assessed and the means adopted to alleviate its consequences will unquestionably vary from case to case, it is possible to identify some general principles that apply in all situations and can facilitate the overall management of absenteeism.

Sound management of absenteeism will enable an employer to exercise its right to manage, while respecting the fundamental rights of its employees. For example, effective management of disability may allow a business to retain experienced employees who become disabled, and make substantial savings in terms of health, time and insurance costs.[102] In this part, we shall look at a series of measures employers may adopt. Naturally, selection will depend on the size, nature and capacity of the business.

5.1 A workplace disability management program

It is important for both employer and employee to take a broad view of the absenteeism issue when problems arise. It is essential, in fact, that they be aware of their rights and responsibilities and know how to proceed in cases of long-term absence.[103] A workplace disability management program can greatly facilitate the reintegration of employees affected by a work accident, a psychological illness or a dependence problem, or who are returning to work after a prolonged absence. A program developed in cooperation with all concerned can produce a joint strategy that

---

[101] C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme*, op cit., p. 121.

[102] For examples of companies that have substantially reduced their absenteeism costs by means of a disability management strategy based on cooperation and a search for reasonable accommodation, see Kathy Dorrell, "Disability Champions," (Feb 2001) 25 *Benefits Canada*, Issue 2. The article mentions in particular Canadian Pacific National Railways, with 1,700 employees, and the City of Medicine Hat, with 1,000. For example, through its disability management program, the City of Medicine Hat has been able to reduce the number of workers suffering from long-term disability by 33% and its absenteeism management costs by $1.2 million.

[103] C. Le Corré; F. Demers; G. Dulude *La Gestion pratique de l'absentéisme*, op cit., p. 29.

meets the needs of the organization and defines the rights and responsibilities of each party. It can also set out a procedure to be followed in cases of conflict and coordinate the services provided by existing structures, such as health and safety committees and employee assistance programs. Such a program allows a comprehensive approach to absenteeism and the planning of measures to deal with it, ranging from prevention to the reintegration of employees affected by a disability. The process of developing a program to manage absenteeism also offers a good opportunity to review existing policies and ensure that they respect employees' fundamental rights.[104]

A growing number of professionals and other resources are available to businesses wishing to set up such programs.[105] Moreover, Canada was the first country in the world to develop a *Code of Practice for Disability Management*, which the International Labour Office made extensive use of in its 2001 *Code of Practice on Managing Disability in the Workplace*.[106] These publications can be very helpful to anyone wishing to put in place mechanisms for the management of absenteeism due to disability.

5.2 Cooperation and dialogue

The literature as a whole indicates that the most efficient practices for managing an employee's return to work are those based on cooperation among all concerned, in particular the employee, managers, supervisors, union representatives, co-workers, health professionals, the return-to-work coordinator and benefit providers.[107] According to a 2000 study by the School of Industrial

---

[104] For example, policies on sick leave, drug and alcohol testing and attendance programs may be discriminatory if they are applied without regard for persons absent for reasons of pregnancy, disability or family status. Employers must therefore ensure that their application does not constitute abuse. See sections 2.2, 3.6 and 4.1, which provide relevant examples.

[105] The National Institute of Disability Management and Research (NIDMAR) has developed, among other things, a Consensus Based Disability Management Audit (CBDMA) system for organizations that wish to get the most out of their investment in a disability management program. The system is recognized in Canada, Germany, the United Kingdom, Ireland and Australia. See Alison MacAlpine, "Front Lines of Disability," *Benefits Canada*, (Nov 2005), p. 87; and National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management, 2nd edition, 2004.*

[106] National Institute of Disability Management and Research (NIDMAR), op. cit., and International Labour Office, *Code of Practice on Managing Disability in the Workplace*, Geneva, 2002.

[107] Ibid, p.30.

Relations at Cornell University, workplace management of disability is an area in which it is possible to develop a valuable consensus between employees and management.[108]

As we have seen, the individual right not to be discriminated against often conflicts with collective rights enshrined in collective agreements: seniority rights, for example. This often causes disputes between the union and the employer, and among employees within the same bargaining unit.[109] However, cooperation between employee representatives and the employer is absolutely vital in reconciling the interests of all, and avoiding conflicts that can land them in court. In this connection, the striking of a parity committee to manage the implementation of a disability management program has been recommended by a number of experts in the field.[110]

Effective and positive communication between employee and supervisor is essential to success in accommodation and the return to work.[111] As we have seen, however, the disclosure of personal data in such circumstances must respect the privacy of the employee. Apart from cases in which accommodation absolutely requires the disclosure of medical information containing a diagnosis, an employee may choose whether to disclose the nature of the disability to the supervisor or co-workers.

While it is fairly rare for an employee an employee to be compelled to reveal the nature of his or her disability, there are sometimes advantages in doing so. Most respondents surveyed for a recent study by the Canadian Mental Health Association reported that being able to discuss their condition openly with their employer had been a key factor in keeping their job.[112] In particular,

---

[108] Suzanne Bruyère, "Disability Employment Policies and Practices in Private and Federal Sector organizations," Ithaca, NY: Cornell University, School of Industrial and Labor Relations Extension Division, Program on Employment and Disability, 2000, cited in National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management, op. cit.*

[109] Chris Rootham, Sean McGee, Bill Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases," op, cit, p. 70.

[110] C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail*, op. cit., p. 362; Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, Ottawa, June 2000, Recommandation 11; National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management, op. cit.*.

[111] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management, op. cit.*

[112] Julie L. FLATT, *Hangin' In There: Strategies For Job Retention by Persons With a Psychiatric Disability*, Canadian Mental Health Association, 2005, 39 p., p. 18. A number of people with a mental illness and their employers, from a number of cities in Canada, were interviewed over a two-month period.

disclosure can reduce tension and anxiety about eventual discovery, facilitate requests for support within the workplace, and make it possible to develop strategies to help co-workers react appropriately in a crisis.[113]

However, disclosing a psychological disability or some other disease that often leads to extensive prejudice, such as HIV/AIDS, is not an easy decision. Those affected by such disabilities may be ostracized or treated differently when their problem is disclosed. An open environment where differences are respected makes such a disclosure easier. An established policy, familiar to all, spelling out how people are to be treated after disclosure can help those who wish to do so to share their situation.

5.3 Working conditions that promote the physical and mental health of employees

Employers can help prevent some diseases or accidents by promoting health and safety in the workplace. Workplace health and safety legislation contains a number of provisions with which employer and employee are obliged to comply, particularly with respect to clothing, equipment and hazardous materials.[114] Other measures not covered in the legislation may also be adopted, in particular to reduce the risk of the development of job-stress-related diseases.

There are a number of studies showing connections between stressful working conditions and such diseases as depression and anxiety, cardiovascular disease, back pain and alcohol dependence.[115] A situation in which an employee has little control, combined with very high requirements, is harmful to his or her health. It seems that organizational fairness also affects

---

[113] Ibid, p. 19.

[114] See in particular the Canada Labour Code, R.S.C. (1985), c. L-2, sections 122-165.

[115] National Institute of Disability Management and Research (NIDMAR), *Challenges in Disability Managment: A Resource Manual for Return to Work Practitioners*, 2004, p. 35: For example, a toxic workplace can as much as triple the incidence of cardiovascular disease or back pain. For studies of the connections between poor work performance and the incidence of depression and anxiety, see Dan Bilsker, "Mental Health Care and the Workplace," (Feb. 2006) 51 No. 2 *Can. J. Psychiatry*, 2, p.1, quoting: F.M. Fisher, T.C. Morata, M.R. Latorre, E.F. Krieg, A.C. Fiorini, S. Colacioppo, and others, "Effects of Environmental and Organizational Factors on the Health of Shiftworkers of a Printing Company," (2001) *J Occup Environ Med*, 43:882–9 ; J. Wang, S.B. Patten, "Perceived Work Stress and Major Depression in the Canadian Employed Population, 20–49 Years Old" (2001) *J Occup Health Psychol*, 6:283–9; and Kristy Sanderson, Gavin Andrews, "Common Mental Disorders in the Workforce: Recent Findings from Descriptive and Social Epidemiology, (Feb. 2006) 51 No.2 *Can. J. Psychiatry*, p. 63.

employee well-being.[116] Clarification of duties and expectations, the training of supervisors to recognize good work, the opportunity to express an opinion on the duties assigned, and a clear and transparent decision-making process are all elements that can improve the quality of life at work.[117] In order to reduce the incidence of psychological and stress-related diseases, therefore, it is necessary to invest in the quality of the work experience, to focus on human factors and to devise strategies based on the development of a feeling of well-being.[118]

Since psychological illness is one of the main causes of disability, employers should pay special attention to the mental health of their employees.[119] The organization can develop, among other things, mechanisms to detect early signs of psychological illness or dependence in its employees. Episodes of mental illness are often preceded by a period of psychological distress marked by, for example: chronic fatigue, loss of energy, poor concentration, lowered motivation, mood swings, argumentative attitudes, a tendency to seek solitude, the appearance of scattered absences, reduction in the quantity or quality of work, or unusual enthusiasm.[120] The organization can then intervene and encourage the employee to take a step back, refer him or her to a helping professional, or suggest sick leave, in order to prevent the situation from degenerating and leading to a prolonged absence. Early access to services and treatment has proved very cost-effective for some companies.[121]

Reducing the risk of mental illness at work is a significant complement to clinical casework in lessening the burden of depression and anxiety in the workplace.[122] If a poisoned environment has contributed to a bout of depression, treatment will be compromised if nothing has changed when the employee returns to work.[123] As Dr. Dan Bilsker explains, a bridge must be built between the health care system and the workplace, in order to manage mental illness properly:

---

[116] Kristy Sanderson, Gavin Andrews, "Common Mental Disorders in the Workforce: Recent Findings from Descriptive and Social Epidemiology," op. cit., p. 72.
[117] Ibid, p. 71-72.
[118] Groupe Conseil AON, "Santé mentale au travail : Quand la tête et le cœur n'y sont plus...." op. cit., p. 491.
[119] Julie L. FLATT, *Hangin' In There: Strategies for Job Retention by Persons With a Psychiatric Disability*, op. cit., p. 6.
[120] Ibid, p. 488.
[121] Canadian Mental Health Association, "Enhancing Productivity in Canada: Benefiting from the Contribution of All Canadians," September 2005, 13 p., p.7.
[122] Kristy Sanderson, Gavin Andrews, "Common Mental Disorders in the Workforce: Recent Findings from Descriptive and Social Epidemiology," op. cit., p. 63.
[123] Ibid, p. 72.

"It has been observed that the worlds of mental health and work have elaborated two cultural traditions, speak different languages, are philosophically distinct... Bridging the domains of mental health care and the workplace is a critical task if we want to effectively manage common mental disorders."[124]

Employee assistance programs (EAPs) can also be used to help employees cope with problems of stress, drugs or alcohol, and with marital or financial difficulties. Such programs can also promote physical fitness and healthy living habits. In addition to showing that a company cares about its employees and creating a feeling of belonging, they can help prevent absenteeism at the source.[125] EAPs must be confidential and easily accessible. Support programs can play a key role in keeping employees on the job. For example, a mental health study has shown that the individuals with the highest job retention rates had continued to receive formal or informal help after going back to work.[126]

Small businesses often lack the resources to develop an EAP. Nevertheless, they can refer their employees to services available in the community. With a small contribution, they can also develop group resources in partnership with other small businesses.[127]

5.5 Training and education

Employees and managers, beginning with the most senior, can benefit considerably from training designed to raise their awareness of the myths and the stigma surrounding disability, and specific forms of disability.[128] Complaints of discrimination brought before tribunals by employees who are sick often results from stereotypes and preconceived ideas. For example, people suffering from mental illness face an intense stigma in the workplace. Many employers and employees express unwarranted fears and see such people as incompetent, unproductive, violent or unable to

---

[124] Dan Bilsker, "Mental Health Care and the Workplace," op. cit., pp. 1-2.
[125] C. Le Corré; F. Demers; G. Dulude, *La Gestion pratique de l'absentéisme*, op cit., p. 155.
[126] Julie L. Flatt, *Hangin' In There: Strategies for Job Retention by Persons With a Psychiatric Disability*, op. cit., p. 34.
[127] For more information on problems facing small businesses and opportunities available to them in managing workplace disabilities, see: National Institute of Disability Management and Research (NIDMAR), *Challenges in Disability Managment: A Resource Manual for Return to Work Practitioners*, op. cit..
[128] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit.

deal with pressure on the job.[129] Interestingly, discrimination sometimes results from a mistaken belief on the part of the employer that accommodation is needed, when all that is needed is for the organization to lose its misperceptions about persons with disabilities.[130] Education about prejudice and stereotypes about certain disabilities can be much improved by consulting specialized agencies.[131]

All employees and managers should also receive clear information on the company's disability management strategy. They should be informed of their rights and responsibilities and the measures or programs available. Training should include information about accommodation that may be needed in cases of disability. Providing details about the underlying reasons for accommodation helps employees who require it to feel included, and avoid any feelings among their co-workers that they are receiving preferential treatment. Co-workers can also draw comfort from the thought that such measures would also be available to them if needed.[132]

The employer must demonstrate that it encourages its employees to avail themselves of the programs and measures available in the workplace, and that they will not suffer any negative consequences for taking advantage of them. For example, it has been shown that participation in workplace family-friendly programs was sometimes surprisingly low.[133] There is apparent reluctance on the part of employees to make use of such programs in the belief that it may create negative perceptions about their commitment to their job and their career and have long-term consequences. Employees tend to be less distrustful if their representatives are involved in developing and promoting such programs.

---

[129]Canadian Psychiatric Association, *Mental Illness and Work*, http://www.cpa-apc.org/MIAW/pamphlets/work.asp (March 23, 2006).

[130] Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's in? Who Wins? What? Why?", (Fall 2000) 26 *Queen's Law Journal 225*, p. 272. The author collected data on human rights and disability decisions in British Columbia, Ontario, Nova Scotia and the federal jurisdiction between 1985 and 1998.

[131] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit.; International Labour Office, *Code of Practice on Managing Disability in the Workplace*, op. cit., article 3.2.3.

[132] See in particular Jill Schachner Chanen, "In Sickness Or in Health" (Feb. 2004), 90 *ABA Journal*, p. 2.

[133] Ontario Human Rights Commission, *Human Rights and the Family in Ontario*, op. cit., p.27 cites Derrick Comfort et al., *Part-time work and family-friendly practices in Canadian workplaces*, Ottawa, Statistics Canada and Human Resources Development Canada, 2003; Kelly Ward, Lisa Wolf-Wendel, "Fear Factor: How Safe is it to Make Time for Family?" (Nov-Dec 2004) *Academe*; Debra B. Schwartz, *An Examination of the Impact of Family-Friendly Policies on the Glass Ceiling*, report prepared for the US Department of Labour, Glass Ceiling Commission (New York: Families and Work Institute), 1994.

5.6 Planning the return to work

Planning the return to work after a prolonged absence is the core of any absenteeism management strategy. Some experts feel that the key to managing workplace disability is to maintain the connection between the sick or injured employee and his or her work environment.[134] Early cooperation among all concerned can speed an employee's return. Once health permits, it is important to plan for an early return, well in advance of complete recovery. The longer the absence, the poorer the chances of reintegration.[135] An employee who is absent from work for a long time will tend to suffer some psychological fragility. The less contact he or she has with the work environment, the greater the fear of relapse or of having lost one's touch.[136]

In some cases, the organization will have to make temporary or permanent changes in the environment to enable a disabled employee to return to work. It must be able to identify and coordinate the opportunities for productive employment the workplace offers to that end. An employment possibility will be assessed on the basis of the limitations of the person and the risks a job presents for him or her. Research has shown that the possibilities for a return to work after an accident or illness increase considerably when workplace disability management programs are in place.[137]

Once accommodation measures have been taken, it is important to evaluate them periodically to avoid any risk of injury or of aggravating the disability. When such measures are temporary, evaluation must be carried out regularly so as to monitor the employee's condition closely and make any changes needed. In the case of permanent or long-term disability, the arrangements can be permanent, designed to be used at any time, or available if the disability returns.[138] It may be that the return to work carries no restrictions, as after maternity leave. In such cases, it is

---

[134] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit..
[135] Groupe Conseil AON, "Santé mentale au travail : Quand la tête et le cœur n'y sont plus...," op. cit., p. 494; National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit..
[136] Ibid.
[137] NIDMAR, Code, p.23.
[138] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit.

important to ensure that the employee's knowledge is updated so that she can resume productive work and enjoy the same employment and advancement opportunities as her co-workers.

It is essential that the absence of an employee, and planning for the return to work, do not generate an excessive workload for his or her co-workers. While they may be understanding initially, they will often become eventually hostile towards the employee if the extra workload is prolonged or becomes too heavy.[139] In such cases, solutions may involve a gradual return, with spare human resources or the designation of a sponsor to accompany the returning employee in resuming duties and swiftly relieve any tension that may develop. When accommodation creates more work for others, the employer can also try to obtain union support by raising the pay of those who have more to do, or by having the accommodated employee perform tasks he or she is reasonably able to do and which are normally performed by these same co-workers. Such measures may eliminate some of the negative effects and dissipate any feeling of unfairness.[140] In every case, planning for the return to work can certainly be facilitated by a return-to-work coordinator or a specialist in workplace disability management, and by the parity committee, if there is one.[141]

---

[139] Groupe Conseil AON, "Santé mentale au travail : Quand la tête et le cœur n'y sont plus...," op. cit., p. 494.
[140] C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail*, op. cit., p. 335.
[141] National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management*, op. cit.

Conclusion

Long-term absenteeism is a significant and costly problem that affects employers, unions, employees and their families. A constantly growing phenomenon, it presents many challenges for those concerned, particularly with respect to the return to work of the absentee. As we have seen in this paper, under Canada's human rights legislation, the employer and the union must do everything reasonably possible to facilitate the return to work of a person who has been absent for reasons of disability, pregnancy or family status. The parties involved must work together to find a reasonable solution that will ensure respect for the employee's fundamental rights, while taking into consideration any hardship the situation imposes on the employer or the union.

Given these complex obligations, employers and employees' representatives are increasingly well-advised to adopt disability management strategies that help to eliminate problems at the source and facilitate the reconciliation of the interests involved. A workplace disability management program, developed with input from all concerned, allows a comprehensive approach to absenteeism and the planning of various measures to deal with it, ranging from prevention to the reintegration of employees. Collaboration between employees and management to ensure working conditions that promote physical and mental health, balancing of work and family obligations and the return of employees as quickly as possible to their jobs or to other suitable jobs is in the best interests of all concerned. Not only does it enable the parties to meet their legal obligations, but it also favours a reduction in disability insurance premiums, increased productivity, and opportunities for people who have had to be absent to resume an active life in dignity.

Bibliography

Monographs

L. Bernier, L. Granosik, J.-F. Pednault, *Les droits de la personne et les relations de travail,* [Human Rights and Labour Relations], Cowansville, Quebec, Éditions Yvon Blais, Updated 17 Nov. 2005.

C. Brunelle, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail* [Disciplinary and Non-Disciplinary Action in Group Labour Relations], Cowansville, Quebec, Éditions Yvon Blais, Updated 11 Nov. 2005.

S. Bruyère, *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, Ithaca, NY: Cornell University, School of Industrial and Labor Relations Extension Division, Program on Employment and Disability, 2000.

Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, Ottawa, June 2000.

Canadian Human Rights Commission, *Annual Report (2004)*, Ottawa, 2004.

Canadian Human Rights Commission, *Bona Fide Occupational Requirements and Bona Fide Justifications Under the Canadian Human Rights Act,* Ottawa, 2000

Canadian Human Rights Commission, *A Place for All: A Guide to Creating an Inclusive Workplace,* Ottawa, 2001.

Canadian Mental Health Association, *Enhancing Productivity in Canada: Benefiting from the Contribution of All Canadians*, September 2005.

M. A. Coady, S. M. Tucker, *Accommodating Mental Disabilities, Presented at the Duty to Accommodate in the Unionized Workplace Conference*, Borden, Ladner Gervais, March 6, 2002.

D. Comfort et al., *Part-Time Work and Family-Friendly Practices in Canadian Workplaces*, Ottawa, Statistics Canada and Human Resources Development Canada, 2003.

Commission des droits de la personne et des droits de la jeunesse, *La compatibilité avec la Charte québécoise des tests de dépistage de drogue en emploi* [Human Rights and Youth Rights Commission: Compatibility Between the Quebec Charter and Workplace Drug Tests], Quebec City, June 1998.

Conseil du Patronat du Québec, *L'absentéisme en milieu de travail : la situation*, [Employers' Council of Quebec, Workplace Absenteeism: The Situation], File 98-14, 1998.

L.F. Dagenais, *Atteintes à la santé psychologique, conditions de travail et obligations du droit à la santé* [Impairment of Psychological Health, Working Conditions and Right-to-Health Obligations], Commission des droits de la personne et des droits de la jeunesse, Quebec City, December 2004.

L. Duxbury, C. Higgins, R. Ivey, *The 2001 National Work-Life Conflict Study: Report One*, Public Health Agency of Canada, March 2002.

L. Duxbury, C. Higgins, R. Ivey, *Work-Life Conflict in Canada in the New Millennium: A Status Report,* Public Health Agency of Canada, October 2003.

Julie L. Flatt, *Hangin' In There: Strategies for Job Retention by Persons With a Psychiatric Disability,* Canadian Mental Health Association, 2005.

International Labour Office, *Code of Practice on Managing Disability in the Workplace*, Geneva, 2002.

International Labour Office, *Management of Alcohol- and Drug-Related Issues in the Workplace, 1996*, Geneva, 1996.

R. Lafond, *Le droit au retour au travail : examen pratique de ses paramètres d'exercice*, [The Right to Return to Work: A Review of How It is Exercised in Practice], Développements récents en droit de la santé et sécurité au travail, Cowansville, Quebec, Éditions Yvon Blais, 2003.

C. Le Corré, F. Demers, G. Dulude, *La Gestion pratique de l'absentéisme* [Practical Management of Absenteeism], Cowansville, Quebec, Éditions Yvon Blais, 2000.

C. Le Corré, M.-A. Laroche, L. Bernier, *Gestion moderne de la discipline : tout ce qu'un employeur doit savoir* [Modern Discipline Management: Everything An Employer Needs to Know], Cowansville, Quebec, Éditions Yvon Blais, 2003.

J. Martel, *La santé psychologique au travail... de la définition du problème aux solutions* [Psychological Health in the Workplace: Definition and Solutions], Fascicule 3, Quebec City, Chair in Workplace Health and Safety Management, Laval University, 2003.

M. Mitchnick, B. Etherington, *Leading Cases on Arbitration, Discharge and Discipline*, Lancaster House, Volume 2, December 2005.

National Institute of Disability Management and Research (NIDMAR), *Challenges in Disability Management: A Resource Guide for Return to Work Practitioners*, 2004.

National Institute of Disability Management and Research (NIDMAR), *Code of Practice for Disability Management,* 2nd Edition, 2004.

Ontario Human Rights Commission, *Human Rights and the Family in Ontario*, March 2005.

J.-M. Robert, *L'application de la Loi sur les accidents du travail et les maladies professionnelles aux employés de l'État canadien et aux travailleurs des entreprises fédérales: où en sommes-nous?* [Applying the *Act Respecting Industrial Accidents and Occupational Diseases* to Federal Government and Agency Employees: Where Are We Now?], Développements récents en droit de la santé et sécurité au travail, Cowansville, Quebec, Éditions Yvon Blais, 2002.

D. B. Schwartz, *An Examination of the Impact of Family-Friendly Policies on the Glass Ceiling*, Report prepared for the US Department of Labour, Glass Ceiling Commission (New York: Families and Work Institute), 1994.

Articles

D. Bilsker, S. Wiseman, M. Gilbert. "Managing Depression-Related Occupational Disability: A Pragmatic Approach," (Feb. 2006) 51 No. 2 *Can. J. Psychiatry, p. 76-83.*

D. Bilsker, "Mental Health Care and the Workplace," (Feb. 2006) 51 No. 2 *Can. J. Psychiatry,* p. 1-3.

K. Dorrell, "Disability Champions," (Feb 2001) 25 *Benefits Canada*, Issue 2.

F.M. Fisher, T.C. Morata, M.R. Latorre, E.F. Krieg, A.C. Fiorini, S. Colacioppo et al., "Effects of Environmental and Organizational Factors on the Health of Shiftworkers of a Printing Company," (2001) *J Occup Environ Med,* 43:882–9.

Groupe Conseil AON, "Santé mentale au travail: Quand la tête et le cœur n'y sont plus... [Mental Health in the Workplace: When the Head and the Heart Are No Longer in It]," (Oct. 2001) 69 *Assurances*, p.487-496.

K. Joachim, "Seniority Rights and the Duty to Accommodate," (Fall 1998) 24 *Queen's L. J.,* p. 131-186.

J. Keene, "The Ontario Human Rights Code and the Right to Accommodation in the Workplace for Employees with Disabilities," (2001) 16 *Journal of Law and Social Policy*, p. 185-205.

M. Lynk, "A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law," (1998) 49 *Labour Law Journal*, p. 962-980.

A. MacAlpine, "Front Lines of Disability," *Benefits Canada* (Nov 2005), p. 86-90.

J.A. Martin, "A Colloquy on Employment and Labour Law and Policy for the New Millennium: Bringing a Critical Gender Lens to Work-Family Balance Issues in the Workplace," (2004) 67 *Saskatchewan Law Review*, pp. 507-523.

Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's in? Who Wins? What? Why?", (Fall 2000) 26 *Queen's L. .J.*, p. 225-276.

C. Rootham, S. McGee, B. Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases," (2004) *11 Canadian Labour & Employment Law Journal,* pp. 69-112.

K. Sanderson, G. Andrews, "Common Mental Disorders in the Workforce: Recent Findings from Descriptive and Social Epidemiology," (Feb. 2006) 51 No.2 *Can. J. Psychiatry*, pp. 63-75.

C. J. Schachner, "In Sickness or in Health," (Feb. 2004) 90 *ABA Journal*, p. 2.

A. Violette, "Les tests de dépistage d'alcool et de drogues en milieu de travail : une question d'équilibre" [Workplace Drug and Alcohol Testing: A Question of Balance], (Printemps 2000) 60 *Revue du Barreau*, pp. 83-128.

J. Wang, S.B. Patten, "Perceived Work Stress and Major Depression in the Canadian Employed Population, 20–49 Years Old," (2001) *J Occup Health Psychol*, 6:283–9.

K. Ward, L. Wolf-Wendel, "Fear Factor: How Safe is It to Make Time for Family?", (Nov-Dec 2004) *Academe.*

Electronic documents

Canadian Human Rights Commission, *Preventing Discrimination – The Duty to Accommodate*, http://www.chrc-ccdp.ca/preventing_discrimination/page7-en.asp?lang_update=1#24f (March 23, 2006).

Canadian Psychiatric Association, *Mental Illness and Work*, http://www.cpa-apc.org/MIAW/pamphlets/work.asp (March 23, 2006).

J. Jenson, *Catching Up to Reality: Building the Case for a New Social Model*, Jan. 2004, www.cprn.org (March 18, 2006);

Office of the Privacy Commissioner of Canada, *A Guide for Businesses and Organizations: Your Privacy Responsibilities*, updated 2004, http://www.privcom.gc.ca/information/guide_e.asp (February 25, 2006).

Ontario Human Rights Commission, *Policy on Discrimination Because of Pregnancy and Breastfeeding*, 2001, http://www.ohrc.on.ca/english/publications/pregnancy-policy.shtml (March 15, 2006).

Standing Senate Committee on Social Affairs, Science and Technology, *A Proposal to Establish a Canadian Mental Health Commission*, October 2005, www.parl.gc.ca (March 3, 2006).

World Health Organization, *Mental Health Disorders Management*, Geneva www.who.int/mental_health/management/depression/definition/en/ (February 28, 2006).